

IN THE UNITED STATES DISTRICT COURT  
FOR THE DISTRICT OF OREGON

AZEWEN-JIK KANTE,	)	
	)	
Plaintiff,	)	
	)	No. CV-07-1407-HU
v.	)	
	)	
NIKE, INC.,	)	FINDINGS & RECOMMENDATION/
	)	ORDER
Defendant.	)	
_____	)	

Azewen-Jik Kante  
289 Clifton Place, No. 2  
Brooklyn, New York 11216

Plaintiff Pro Se

David S. Aman  
TONKON TORP LLP  
1600 Pioneer Tower  
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Portland, Oregon 97204-2099

Attorney for Defendant

HUBEL, Magistrate Judge:

Plaintiff Azewen-Jik Kante, appearing pro se, brings this action against defendant Nike, Inc., for breach of implied in law contract and conversion. The claims are based on plaintiff's allegations that Nike used her ideas, submitted to Nike in 1992 in

1 the form of drawings and a "commercial pitch," to create the "SHOX"  
2 line of shoes, and failed to compensate plaintiff for her idea.

3 Defendant moves for summary judgment on the basis of the  
4 statute of limitations. I recommend that the motion be granted.  
5 Defendant also moves to strike certain evidence submitted by  
6 plaintiff in opposition to the motion. I grant the motion in part,  
7 deny it in part, and deny it as moot in part.

#### 8 BACKGROUND

9 Because defendant's motion is limited to the statute of  
10 limitations, I need not and do not reach the issue of what facts  
11 establish defendant's liability on the merits of either of  
12 plaintiff's claims. For this motion, I consider only whether the  
13 record establishes an absence of material fact regarding the  
14 application of the statute of limitations to plaintiff's claims.

15 The facts recited here are either undisputed by the parties'  
16 or are accepted by defendant for the purposes of this motion only.

17 In 1991, at age twelve, plaintiff created ten drawings of an  
18 athletic shoe having four springs in its heel. In 1992, at the age  
19 of thirteen, plaintiff submitted the ten original drawings to  
20 defendant, which reviewed and considered them. Defendant then  
21 informed plaintiff that it was not interested in the shoe design.  
22 An August 5, 1992 letter from Nike employee Marie E. Smith thanked  
23 plaintiff for submitting her idea, informed plaintiff that  
24 defendant decided to forego the opportunity at the time, and  
25 further informed plaintiff that it was returning her materials with  
26 the letter.

27 Defendant allegedly did not return seven of the ten drawings,  
28 including those with words "Spring Jump, and "Boing," and showing

1 four springs in the heel. Plaintiff called defendant two or three  
2 times each year between 1992 and 2003 in an attempt to speak with  
3 whomever was handling her submission and to obtain the remaining  
4 drawings.

5 Defendant allegedly incorporated plaintiff's ideas in its SHOX  
6 shoe which was sold beginning in 2000. The word "Boing" appeared  
7 in a commercial for the SHOX shoe. Plaintiff acknowledges that in  
8 1999, she saw a television commercial for the shoe and immediately  
9 concluded that the commercial and the shoe were based on her 1992  
10 submissions to defendant. She confirmed this conclusion in July  
11 2001 when her sister saw and purchased a SHOX shoe and told  
12 plaintiff that it appeared the shoe was created from plaintiff's  
13 concept and drawings she submitted to defendant in 1992.

14 In 2003, plaintiff spoke with defendant's in-house counsel  
15 William Berner who then sent plaintiff copies of the three drawings  
16 defendant had returned in 1992. Plaintiff filed this action on  
17 September 21, 2007.

#### 18 STANDARDS

19 Summary judgment is appropriate if there is no genuine issue  
20 of material fact and the moving party is entitled to judgment as a  
21 matter of law. Fed. R. Civ. P. 56(c). The moving party bears the  
22 initial responsibility of informing the court of the basis of its  
23 motion, and identifying those portions of "'pleadings, depositions,  
24 answers to interrogatories, and admissions on file, together with  
25 the affidavits, if any,' which it believes demonstrate the absence  
26 of a genuine issue of material fact." Celotex Corp. v. Catrett,  
27 477 U.S. 317, 323 (1986) (quoting Fed. R. Civ. P. 56(c)).

28 "If the moving party meets its initial burden of showing 'the

1 absence of a material and triable issue of fact,' 'the burden then  
2 moves to the opposing party, who must present significant probative  
3 evidence tending to support its claim or defense.'" Intel Corp. v.  
4 Hartford Accident & Indem. Co., 952 F.2d 1551, 1558 (9th Cir. 1991)  
5 (quoting Richards v. Neilsen Freight Lines, 810 F.2d 898, 902 (9th  
6 Cir. 1987)). The nonmoving party must go beyond the pleadings and  
7 designate and support facts showing an issue for trial. Celotex,  
8 477 U.S. at 322-23.

9 The substantive law governing a claim determines whether a  
10 fact is material. T.W. Elec. Serv. v. Pacific Elec. Contractors  
11 Ass'n, 809 F.2d 626, 630 (9th Cir. 1987). All reasonable doubts as  
12 to the existence of a genuine issue of fact must be resolved  
13 against the moving party. Matsushita Elec. Indus. Co. v. Zenith  
14 Radio, 475 U.S. 574, 587 (1986). The court should view inferences  
15 drawn from the facts in the light most favorable to the nonmoving  
16 party. T.W. Elec. Serv., 809 F.2d at 630-31.

17 If the factual context makes the nonmoving party's claim as to  
18 the existence of a material issue of fact implausible, that party  
19 must come forward with more persuasive evidence to support his  
20 claim than would otherwise be necessary. Id.; In re Agricultural  
21 Research and Tech. Group, 916 F.2d 528, 534 (9th Cir. 1990);  
22 California Architectural Bldg. Prod., Inc. v. Franciscan Ceramics,  
23 Inc., 818 F.2d 1466, 1468 (9th Cir. 1987).

#### 24 DISCUSSION

25 Plaintiff's first claim is for breach of contract implied in  
26 law and is based on her allegations that she sent drawings and  
27 other materials to defendant in 1992, received only three drawings  
28 back, that she demanded the return of the other drawings from 1992

1 to 2003, but has not received them, and that since 2000, defendant  
2 has been selling its SHOX shoes which incorporate her invention.  
3 She contends that she has no adequate remedy at law, that defendant  
4 willfully withheld the drawings, and that defendant has been  
5 unjustly enriched. Her second claim is for conversion, based on  
6 her allegations that defendant refuses to return the drawings, this  
7 refusal is intentional, and defendant now exerts dominion over  
8 them.

9 Defendant moves for summary judgment as to both claims, based  
10 on the following arguments: (1) plaintiff's claims are displaced  
11 by the Oregon Trade Secrets Act (OTSA) which carries a three-year  
12 statute of limitations and thus, they are time-barred; (2) even if  
13 the claims are not displaced by the OTSA, the claims are still  
14 time-barred; (3) plaintiff has no evidence to support her claim of  
15 fraudulent concealment; and (4) plaintiff's status as a minor until  
16 1997 does not save her claim from the statute of limitations.

#### 17 I. OTSA Preemption

18 With some limited exceptions, the OTSA supersedes "conflicting  
19 tort, restitution or other laws of Oregon providing civil remedies  
20 for misappropriation of a trade secret." Or. Rev. Stat. § O.R.S.  
21 646.473(1). The OTSA does not affect contractual remedies (whether  
22 or not based upon misappropriation of a trade secret), other civil  
23 remedies that are not based upon misappropriation of a trade  
24 secret, criminal remedies (whether or not based upon  
25 misappropriation of a trade secret), or any defense, immunity or  
26 limitation of liability afforded public bodies, their officers,  
27 employee, or agents under the Oregon Tort Claims Act. Id.

28 In a 2004 opinion, Judge Brown considered an implied contract

1 counterclaim brought by defendant Dixon in a case brought against  
2 him by Nike. Nike, Inc. v. Dixon, No. CV-01-1459-BR, 2004 WL  
3 3065757, at \*5 (D. Or. Apr. 6, 2004), aff'd 163 Fed. Appx. 908  
4 (Fed. Cir. 2006). Dixon contended that Nike had been unjustly  
5 enriched by its alleged misappropriation of Dixon's trade secrets  
6 in his "Shockee 2000" shoe design. Id. Judge Brown labeled the  
7 claim as one for "Breach of Implied Contract - Unjust Enrichment."  
8 Id.

9 Judge Brown discussed one of her earlier cases, which in turn  
10 had discussed cases from other jurisdictions that, like Oregon, had  
11 adopted the Uniform Trade Secrets Act and had held unjust  
12 enrichment and quasi-contract claims based on alleged  
13 misappropriation of trade secrets to be preempted by the statute.  
14 Id. (quoting nMotion, Inc. v. Environmental Tectonics Corp., No.  
15 CV-01-524-BR, Op. & Ord. at pp. 30-31 (D. Or. Oct. 27, 2003)). She  
16 noted first that a quasi-contract claim is restitutionary in nature  
17 even though it uses the language of contract law. Id. Moreover,  
18 the statute "arose to create a uniform business environment that  
19 created more certain standards for protection of commercially  
20 valuable information." Id. (internal quotation omitted). Thus,  
21 the statute provides "the only avenue for claims based on idea  
22 misappropriation." Id. (internal quotation omitted).

23 Based on this discussion, Judge Brown concluded that Dixon  
24 sought restitution in his claims for quasi-contract/unjust  
25 enrichment based on the alleged misappropriation of the same  
26 alleged trade secrets that were the subject of claims that he  
27 brought directly under the OTSA. Id. She concluded that the  
28 OTSA's remedies for restitution under these claims superseded any

1 restitution remedy available under common law. Id.

2 Cases from other jurisdictions have held that the Uniform  
3 Trade Secrets Act, upon which the OTSA is based, supersedes  
4 conversion claims. E.g., Bliss Clearing Niagara, Inc. v. Midwest  
5 Brake Bond Co., 270 F. Supp. 2d 943, 950 (W.D. Mich. 2003) (where  
6 conversion claim was based on allegations that the defendant  
7 deprived the plaintiff of its exclusive, confidential proprietary  
8 and trade secret rights and interests, and there was no allegation  
9 of damages for the taking of the physical property (the paper  
10 containing the blueprints and drawings), the conversion claim was  
11 properly preempted by the statute).

12 The essence of plaintiff's implied in law contract claim is  
13 the wrongful use by defendant of proprietary material belonging to  
14 plaintiff. This is precisely the type of claim that the OTSA  
15 states is superseded by statute. The same holds true for  
16 plaintiff's conversion claim where she contends that defendant has  
17 wrongfully deprived her of the use of her proprietary material by  
18 failing to return it. Thus, I agree with defendant that the OTSA  
19 supersedes or preempts plaintiff's claims.

20 There is no dispute that plaintiff concluded in 1999 that  
21 defendant had used her drawings in its design of the SHOX shoe, and  
22 that she reaffirmed that conclusion in July 2001, when her sister  
23 actually bought a SHOX shoe and told that the shoe was based on  
24 plaintiff's designs and drawings. As the alleged wrongful use of  
25 the drawings by defendant is the cornerstone of plaintiff's implied  
26 in law claim, plaintiff was possessed of the facts forming the  
27 basis of her claim in either 1999 or July 2001, more than three  
28 years before she filed this action. O.R.S. 646.671 (three-year

1 statute of limitations for OTSA claims). Thus, the claim is time-  
2 barred. Moreover, as discussed below, the conversion claim likely  
3 accrued even earlier. But, even if it had not, it accrued no later  
4 than 1999 or July 2001, again more than three years before  
5 plaintiff filed this action. The conversion claim is also time-  
6 barred.

## 7 II. Six Year Statutes of Limitations

8 If plaintiff's claims are not superseded or preempted by OTSA,  
9 I agree with defendant that they are still time-barred. The  
10 implied in law contract claim is governed by the six-year statute  
11 of limitations for breach of contract claims found in O.R.S.  
12 12.080(1). Jaqua v. Nike, 125 Or. App. 294, 299, 865 P.2d 442, 446  
13 (1993).

14 The elements of a claim for breach of contract implied in law  
15 are (a) a benefit conferred; (2) awareness by the recipient that a  
16 benefit has been received; and (3) under the circumstances, it  
17 would be unjust to allow retention of the benefit without requiring  
18 the recipient to pay for it. Id. at 298, 865 P.2d at 445.

19 As discussed above, the undisputed facts in the record show  
20 that plaintiff was aware in 1999, or at least by July 2001, of all  
21 of the facts supporting her implied in law contract claim: she was  
22 aware that she conferred a benefit on defendant when she submitted  
23 her drawings to defendant in 1992, or alternatively, in 1999 and  
24 2001 when she concluded that defendant had used her idea; defendant  
25 was aware of the benefit it received, either in 1992 when it  
26 received the drawings or sometime between 1992 and when it  
27 incorporated the drawings into the SHOX shoe; and in 1999 or July  
28 2001, plaintiff concluded that defendant had inappropriately used



1 her ideas in its product, creating the alleged injustice. Because  
2 plaintiff filed this action on September 21, 2007, more than six  
3 years after she learned of all the facts supporting her implied  
4 contract claim, it is time-barred even under the more lengthy  
5 statute of limitations.

6 As for the conversion claim, it is also governed by a six-year  
7 statute of limitations. O.R.S. 12.080(4). A conversion claim  
8 accrues once the defendant exercises wrongful dominion or control  
9 over allegedly converted property and controls it in a manner that  
10 seriously interferes with the owner's rights to the property. See  
11 Everman v. Lockwood, 144 Or. App. 28, 32-33, 925 P.2d 128, 130  
12 (1996).

13 The conversion claim accrued sometime between 1992, when  
14 defendant allegedly retained seven of the ten drawings plaintiff  
15 contends she submitted, and 1999 or July 2001. No reasonable juror  
16 could conclude other than that by 1999 or July 2001, plaintiff knew  
17 all the facts supporting a conclusion that defendant had converted  
18 her drawings. As this was six years before she filed this action,  
19 the conversion claim is also time-barred.

### 20 III. Fraudulent Concealment

21 Plaintiff contends that defendant should be equitably estopped  
22 from asserting the statute of limitations against her claims  
23 because defendant's willful withholding of plaintiff's drawings  
24 amounts to fraudulent concealment.

25 Under Oregon law, a "defendant may be estopped if he lulled  
26 the plaintiff, by affirmative inducement, into delaying the filing  
27 of a cause of action or, similarly, if he lulled the plaintiff into  
28 believing he had no cause of action against the defendant."

1 Philpott v. A.H. Robins Co., Inc., 710 F.2d 1422, 1425 (9th Cir.  
2 1983); see also Thayer v. Nydigger, No. 95-2004 AS, 1999 WL 372552,  
3 at \*21 (D. Or. Apr. 15, 1999) (in Oregon, a party who actively  
4 conceals a breach of contract will toll the statute of limitations  
5 until the injured party discovers or, with reasonable diligence,  
6 would have discovered the breach.); Chaney v. Fields Chevrolet Co.,  
7 264 Or. 21, 27, 503 P.2d 1239, 1241 (1972) ("one who wrongfully  
8 conceals material facts and thereby prevents discovery of his wrong  
9 or of the fact that a cause of action has accrued against him is  
10 not permitted to assert the statute of limitations as a bar to an  
11 action against him[.]").

12 The inducement must be affirmative because "silence or passive  
13 conduct of the defendant is not deemed fraudulent, unless the  
14 relationship of the parties imposes a duty upon the defendant to  
15 make disclosure." Philpott, 710 F.2d at 1425 (internal quotation  
16 omitted).

17 Defendant argues that plaintiff cannot satisfy the elements  
18 required for fraudulent concealment. There is no evidence of any  
19 affirmative inducement or concealment that caused plaintiff to  
20 delay filing her claims or to be unaware of her claims. Defendant  
21 notes that actually, the evidence is to the contrary in that  
22 plaintiff asserts that she continually demanded the return of her  
23 drawings and at no time did defendant tell her anything that caused  
24 her to delay filing her claim or that concealed her claim. She  
25 never talked with anyone from Nike for over ten years, from 1992 to  
26 2003.

27 More importantly, defendant continues, plaintiff concluded  
28 defendant was using her design in 1999, when she saw the

1 commercial, and again in July 2001, when her sister called her  
2 about purchasing a SHOX shoe. Fraudulent concealment does not  
3 apply once the plaintiff knows or should reasonably know that he or  
4 she has a claim. See Chaney, 264 Or. at 26-67, 503 P.2d at 1241.  
5 Since plaintiff knew that defendant had used her design more than  
6 six years before she filed the lawsuit, she cannot sustain her  
7 argument that defendant should be equitably estopped from asserting  
8 the six-year statute of limitations applicable to her claims.

9 I agree with defendant. Plaintiff argues that defendant's  
10 failure to return the seven drawings is affirmative conduct of  
11 fraudulent concealment. Alternatively, she contends only passive  
12 concealment was required because she and defendant were in a  
13 special relationship.

14 Defendant's failure to return the drawings is irrelevant to  
15 its alleged use of the drawings and it is the use of the drawings  
16 that supplies the improper or unjust component of the implied in  
17 law contract claim. As for the conversion claim, it is when  
18 plaintiff became aware of defendant's use of her drawings and  
19 defendant's failure to return them that she lost the ability to  
20 make a fraudulent concealment argument. Defendant did nothing to  
21 suggest that it would eventually return the drawings it allegedly  
22 withheld. Since it is undisputed that plaintiff became aware of  
23 defendant's use of the drawings and its failure to return them more  
24 than six years before she filed the action, any conduct by  
25 defendant occurring before then cannot be used to estop defendant  
26 from asserting the statute of limitations against plaintiff's  
27 claims.

28 Additionally, the undisputed facts reveal that plaintiff and

1 defendant acted in nothing other than an arms-length relationship.  
2 Plaintiff's status as a minor in 1992 does not create a special  
3 relationship.

4 Finally, Oregon's tolling provision for minors is simply  
5 inapplicable here. Plaintiff's claims accrued in 1999 or July  
6 2001, after she reached the age of eighteen on January 5, 1997.  
7 The statutory tolling provision is implicated when the plaintiff is  
8 a minor at the time a claim accrues. O.R.S. 12.160(1); see also  
9 O.R.S. 12.170 ("[n]o person shall make use of a disability unless  
10 it existed when the right of action of the person accrued.").  
11 Because plaintiff was no longer a minor at the time her claims  
12 accrued, the claims are not saved by this tolling provision. And,  
13 even if the conversion claim accrued before plaintiff reached the  
14 age of majority, plaintiff's age ceased to be a factor one year  
15 later. O.R.S. 12.160. Thus, regardless of when the conversion  
16 claim accrued, it is time-barred.

#### 17 IV. Motion to Strike

18 Defendant moves to strike portions of the deposition of Larita  
19 Spencer, parts of plaintiff's declaration, and an exhibit, all  
20 submitted by plaintiff in opposition to defendant's motion.

##### 21 A. Larita Spencer Deposition

22 Defendant moves to strike fifteen separate portions of  
23 Spencer's deposition testimony. In its motion, defendant lists the  
24 portions by page and line number, and makes the global argument  
25 that the testimony is "irrelevant, unduly prejudicial, hearsay,  
26 improper speculation, improper character and opinion evidence, and  
27 given without personal knowledge, and therefore inadmissible  
28 pursuant to Federal Rules of Evidence 401, 402, 403, 404, 602, 608,

1 801 and 802." Deft's Mtn to Strike at p. 2.

2 Defendant fails to articulate which of its objections applies  
3 to which challenged portion(s) of the deposition, creating an  
4 unnecessary burden on the Court to determine if the objection to  
5 each challenged portion is one or more of those listed. This  
6 results in an undisciplined and unfocused motion which is not  
7 helpful to the Court.

8 Moreover, while all of the challenged portions of Spencer's  
9 deposition are appended to plaintiff's memorandum in opposition to  
10 the summary judgment motion, her declaration and memorandum contain  
11 only a handful of references to Spencer's testimony and plaintiff  
12 confirmed at oral argument that she relied on only six of the  
13 challenged portions. Thus, I deny the motion as moot as to those  
14 portions of the Spencer's deposition that plaintiff does not rely  
15 on.

16 Plaintiff relies on the following portions of Spencer's  
17 deposition testimony: (1) page 31, lines 3-7 and 16-19; (2) page  
18 33, line 18, to page 34, line 25; (3) page 47, lines 1 -11; (4)  
19 page 65, line 1, to page 66, line 25; (5) page 79, line 17, to page  
20 80, line 11; and (6) page 80, line 21, to page 81, line 4. While  
21 the admissibility of the testimony in these challenged portions of  
22 the deposition is questionable, I deny the motion directed at these  
23 portions as moot because I recommend that the summary judgment  
24 motion be granted even if the testimony is considered.

25 B. Plaintiff's Declaration

26 Defendant moves to strike paragraphs 3, 4, 5, 6, and 7 of  
27 plaintiff's declaration because plaintiff refused to answer  
28 questions in her deposition concerning her communications with her

1 attorneys, asserting the attorney-client privilege. Because,  
2 defendant contends, these paragraphs of her declaration concern  
3 those communications, they should be stricken.

4 While I agree with defendant that plaintiff invoked the  
5 attorney-client privilege in her deposition and thus, should not be  
6 disclosing those privileged communications in her declaration, the  
7 problem is that paragraphs 4, 5, 6, and 7 refer to the fact that  
8 there were communications between attorney and client but do not  
9 reveal the communications themselves. Thus, I deny the motion as  
10 to those paragraphs.

11 Paragraph 3 includes a statement regarding what advice  
12 attorneys told plaintiff regarding a possible claim against  
13 defendant. Because I recommend granting the summary judgment  
14 motion even when considering the statement, I deny the remainder of  
15 the motion to strike as moot.

#### 16 C. Wikipedia Entry

17 Finally, defendant moves to strike an exhibit submitted by  
18 plaintiff which is a copy of the Wikipedia entry for Nike SHOX. I  
19 grant the motion as the evidence is, at best, irrelevant to the  
20 statute of limitations issues raised in the summary judgment  
21 motion.

#### 22 V. Motion to Compel

23 Defendant moves to compel plaintiff to produce certain  
24 evidence. Defendant notes that the evidence is not relevant to the  
25 statute of limitations argument it raises in the summary judgment  
26 motion. Both parties agreed at oral argument that the Court should  
27 defer ruling on the motion to compel until after the summary  
28 judgment motion is resolved. If the Article III District Court

1 Judge to whom the Findings & Recommendation is referred, adopts my  
2 summary judgment recommendation, I further recommend that the  
3 District Court Judge deny the motion to compel as moot. If the  
4 District Court Judge does not adopt my summary judgment  
5 recommendation, I will consider the motion to compel following  
6 entry of the District Court Judge's Order.

7 CONCLUSION

8 I recommend that defendant's motion for summary judgment (#44)  
9 be granted. Defendant's motion to strike (#60) is granted in part,  
10 denied in part, and denied as moot in part.

11 SCHEDULING ORDER

12 The above Findings and Recommendation will be referred to a  
13 United States District Judge for review. Objections, if any, are  
14 due November 12, 2008. If no objections are filed, review of the  
15 Findings and Recommendation will go under advisement on that date.

16 If objections are filed, a response to the objections is due  
17 November 26, 2008, and the review of the Findings and  
18 Recommendation will go under advisement on that date.

19 IT IS SO ORDERED.

20 Dated this 28th day of October, 2008.

21  
22  
23 /s/ Dennis James Hubel  
24 Dennis James Hubel  
25 United States Magistrate Judge  
26  
27  
28